

ESTATE OF KATIE DELACRUZ
and
ESTATE OF JAMES HERBERT SCARBOROUGH

IBIA 86-33, 86-34

Decided May 26, 1987

Appeals from orders issued by Administrative Law Judge Robert C. Snashall requiring the escheat of certain interests in Indian trust or restricted land under the provisions of the Indian Land Consolidation Act. Indian Probate IP PO 54L 85-65 and IP PO 125L 85-145, respectively.

Affirmed in part; reversed in part.

1. Constitutional Law: Generally--Indian Probate: Indian Land Consolidation Act: Escheat

Based on the decision of the United States Supreme Court in Hodel v. Irving, 481 U.S. 704, 55 U.S.L.W. 4653 (U.S. May 18, 1987), that the escheat provisions of sec. 207 of the Indian Land Consolidation Act, as originally enacted, 96 Stat. 2519, are unconstitutional, escheats under that section must be disapproved in cases still pending for administrative determination.

APPEARANCES: Richard Reich, Esq., Taholah, Washington, for appellant; Kristin H. Stred, Esq., Seattle, Washington, for the Quileute Indian Tribe; Dennis J. Whittlesey, Esq., Washington, D.C., for the Chinook Indian Tribe; Vernon Peterson, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Department.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On April 8, 1986, the Board of Indian Appeals (Board) received notices of appeal in the estates of Katie DeLaCruz and James Herbert Scarborough. The notices of appeal were filed by the Quinault Indian Nation (appellant) and sought review of orders issued in the two estates by Administrative Law Judge Robert C. Snashall on February 20 and February 21, 1986, respectively. In both estates, Judge Snashall applied section 207 of the Indian Land Consolidation Act (ILCA) ^{1/} to escheat certain small undivided interests in Indian trust or restricted property on the Quinault Reservation, held by the decedents at the time of their deaths. For the reasons discussed below, the Board holds that Judge Snashall's determination of escheat must be reversed.

^{1/} Act of Jan. 12, 1983, P.L. 97-459, Title II, 96 Stat. 2519, 25 U.S.C. § 2206 (Supp. I, 1983).

Hodel v. Irving

On May 18, 1987, the United States Supreme Court decided the case of Hodel v. Irving, 481 U.S. 704, 55 U.S.L.W. 4653 (U.S. May 18, 1987). Irving challenged the constitutionality of the escheat provisions of section 207 of ILCA. As originally enacted, that section provided:

No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage of such tract and has earned to its owner less than \$100 in the preceding year before it is due to escheat.

96 Stat. 2519. ILCA, including the escheat provisions of section 207, was effective immediately and, therefore, applied to all Indians dying on or after January 12, 1983, owning trust or restricted land.

Section 207 was amended on October 30, 1984. 2/ It presently provides:

(a) No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning \$100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than \$100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning \$100 in any one of the five years following the death of the decedent.

(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

2/ P.L. 98-608, § 1(4), 98 Stat. 3172, 25 U.S.C. § 2206 (Supp. II, 1984).

25 U.S.C. § 2206 (Supp. II, 1984). The amendments were also effective immediately and, therefore, superseded the original version of section 207 and apply to all Indians dying on or after October 30, 1984, owning trust or restricted land.

The Court's decision in Irving held section 207, as originally enacted, was a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. The Court specifically declined to comment on the constitutionality of the amendments to section 207. 55 U.S.L.W. at 4655, n.1.

Discussion and Conclusions

[1] Although the factual and procedural histories of the present probate cases are quite extensive, after the Supreme Court's Irving decision only one fact from each case is relevant to this decision. That fact is the date of death. DeLaCruz died on August 11, 1984; Scarborough died on October 15, 1983. Thus, both individuals died at a time when the original version of section 207 was in effect. Because the original version of the escheat provision has been held unconstitutional by the Supreme Court, and because these cases are still pending for administrative determination, the Court's holding must be applied.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, those parts of Judge Snashall's February 20 and February 21, 1986, orders in these cases holding that certain small fractional interests in Indian trust or restricted land, held by the decedents at the time of their deaths, were subject to escheat is reversed. 3/ Those interests must be distributed to the decedents' heirs and devisees in accordance with Judge Snashall's findings as to the distribution of the remainder of their trust or restricted property. 4/

Kathryn A. Lynn
Administrative Judge

I concur:

Anita Vogt
Acting Chief Administrative Judge

3/ No other parts of Judge Snashall's orders were challenged. The remainder of the orders are, therefore, affirmed.

4/ Appellant raises two additional arguments concerning whether or not Judge Snashall was biased against appellant and should be disqualified from hearing further matters relating to appellant and the Quinault Indian Reservation. The Board has previously held that disagreement over an interpretation of law does not constitute bias. Estate of Charles Ernest Farron, Jr., 15 IBIA 55 (1986).